EMCOR Group, Inc., formerly known as JWP, Inc., and General Energy Development, Inc. and Inte-Fac Corp. *and* Local 30, International Union of Operating Engineers, AFL–CIO. Case 29–CA–18247

March 14, 2000

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On August 11, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondents and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondents, GED and Inte-Fac, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following paragraph 1(a) to the judge's Order and renumber the paragraphs accordingly.

"(a) Failing to bargain with Local 30, International Union of Operating Engineers, AFL–CIO as the exclusive representative of the nonsupervisory chief engineers, engineers, operator/mechanics, and apprentices employed at the Islip landfill and electrical generating facility."

2. Substitute the following for paragraph 2(a).

"(a) Recognize and, on request, bargain with Local 30, International Union of Operating Engineers, AFL–CIO as the exclusive representative of the nonsupervisory chief engineers, engineers, operator/mechanics, and apprentices employed at the Islip landfill and electrical generating facility, with respect to rates of pay, wages, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement."

3. Substitute "March 30, 1994" for "May 18, 1994" in paragraph 2(e).

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the Union, Local 30, International Union of Operating Engineers, AFL–CIO as the exclusive representative of our employees in

[1] In adopting the judge's finding that the Respondents General Energy Development, Inc. (GED) and Inte-Fac Corp. constitute a single employer, we note that, although the judge did find that the Respondents shared common ownership, some degree of common management, and common control of labor relations, the judge did not explicitly mention the fourth single-employer factor, interrelation of operations. See, e.g., *Dow Chemical Co.*, 326 NLRB 288 (1998). The record shows, inter alia, that (1) the truck that GED used in its operations was leased by Inte-Fac, for which Inte-Fac billed GED on a regular basis, (2) Inte-Fac originally set up the contract for bottled water used by GED and regularly billed GED for the water, (3) GED's bookkeeper, Diana Lakin, performed payroll functions for Inte-Fac, (4) Inte-Fac President John Lucchi was involved in GED's construction and was active in its first few years of operations, including dealing with issues involving local unions during the construction of the GED facility, and (5) the person who performed direct supervision over GED's facility, consultant Bob Anderson, was originally an Inte-Fac consultant and was brought into the operations by Inte-Fac President John Lucchi. Thus, there is ample support in the record for a finding that there was an interrelation of operations between GED and Inte-Fac.

In adopting the judge's finding of an 8(a)(5) and (1) violation for refusal to bargain, we note that, although the judge did not explicitly find a general refusal to bargain in addition to the specific finding of failure to notify and afford the Union an opportunity to bargain over the layoffs, the record and the judge's decision support such a finding of a general refusal to bargain as alleged in the complaint. Thus, we modify the notice and Order to reflect our finding of this violation. We further modify par. 2(e) of the Order in accordance with *Excel Container*, 325 NLRB 17 (1997). Finally, we have modified both pars. 1(a) and 2(a) to reflect more accurately the description of the appropriate bargaining unit.

In adopting the judge's finding of an 8(a)(5) and (1) violation concerning the Respondents' failure to bargain over the layoffs, we note that the Respondents have not argued that the analysis set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), applies. We further note that the Respondents have not excepted to the judge's finding that the parties' contractual management-rights clause did not waive the Union's right to bargain over economic layoffs.

[2] Member Brame, unlike his colleagues, would grant the General Counsel's exception to the judge's failure to determine whether the Respondents violated Sec. 8(a)(3). Member Brame would sever and remand this portion of the case because the individual employee rights protected by Sec. 8(a)(3) are different from the rights protected by Sec. 8(a)(5) and, accordingly, a finding of an 8(a)(3) violation would require that the notice contain additional language

[3] The Respondents have excepted to certain aspects of the judge's proposed Order on the ground that, since the layoffs, GED has been sold. We find that the issues raised by this exception are more properly addressed at the compliance stage.

the following unit: all of the chief engineers, engineers, operator/mechanics, and apprentices employed at the Islip landfill and electrical generating facility.

WE WILL NOT unilaterally lay off employees without providing the Union with notice and an opportunity to bargain about that decision and the effects of that decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive bargaining representative of the nonsupervisory chief engineers, engineers, operator/mechanics, and apprentices employed at the Islip landfill and electrical generating facility, with respect to rates of pay, wages, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request, bargain with the Union concerning the decision to lay off employees on April 1, 1994, and the effects of that decision.

WE WILL, within 14 days from the date of the Board's Order, offer Arthur DiNunzio and Vincent Muir full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

INTE-FAC CORP. & GENERAL ENERGY DEVELOPMENT, INC.

Aggie Kappelman, Esq., for the General Counsel.
Judith Kunreuther, Esq., for Respondents Inte-Fac Corp. and EMCOR Group, Inc.
David W. Savelson, Esq., for General Energy Development, Inc.
Mark Soroka, Esq. and *Cheryl Glick, Esq*., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. The hearing in this matter took place in April and May 1997. The charge was filed on May 18, 1994. A complaint was issued by the Regional Director for Region 29 on March 31, 1995, and an amended complaint was issued on December 13, 1996. In substance the amended complaint alleged as follows:

1. That until December 15, 1994, JWP, Inc., a Delaware corporation located in Rye, New York, was engaged in providing engineering, mechanical, and related services.

2. That after December 15, 1994, EMCOR Group, Inc., a Delaware corporation, located in Norwalk, Connecticut, has been engaged in providing electrical, mechanical, and related services.

3. That General Energy Development, Inc. (GED) is a wholly owned subsidiary of JWP and EMCOR and is engaged in providing engineering, mechanical, and related services.

4. That Inte-Fac Corp. is a wholly owned subsidiary of JWP and EMCOR and is engaged in providing engineering, mechanical, and related services.

5. That until December 15, 1995, JWP, EMCOR, GED, and Inte-Fac Corp. have been operated as a single-integrated business enterprise.

6. That the Union has been the exclusive collective-bargaining representative of certain employees in an appropriate unit, and has been recognized by the Respondents in accordance with a series of successive collective-bargaining agreements, the most recent of which ran from November 3, 1990, to November 3, 1993.

7. That on September 1, 1993, January 11 and February 23, and March 22, 1994, the Union requested negotiations.

8. That on or about April 1, 1994, Inte-Fac, for discriminatory reasons, laid off employees Vincent Muir and Arthur DiNunzio, who comprised the entire bargaining unit and ceased its operations at Hauppauge, New York.

9. That the Respondents engaged in the conduct described above in paragraph 8, without affording the Union an opportunity to bargain about the decision and its effects on the employees.

10. That since April 1, 1994, GED has continued to do what Inte-Fac had previously done at the Hauppauge jobsite and has used one employee, John Muir, previously employed by Inte-Fac, but has failed and refused to recall DiNunzio.

11. That since April 1, 1994, GED has refused to recognize or bargain with the Union.

At the opening of the hearing, I granted the General Counsel's motion to withdraw, without prejudice, all allegations relating to EMCOR and JWP. Basically, she intended to reserve such matters for compliance if a violation was found and if it was necessary to name such entities in order to gain compliance with any backpay award. Thus, for purposes of the present proceeding, the Respondents are Inte-Fac Corp. and General Energy Development, Inc., otherwise known as GED.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A company called JWP, Inc. was a very large firm engaged in performing electrical and mechanical contracting services throughout the United States. Prior to 1993, GED was part of a subgroup of JWP subsidiary corporations within JWP's Environmental Group.

Inte-Fac Corp. was and is a New York corporation which was within JWP's mechanical services group.[1]

The parties stipulated that at relevant times here, both GED and Inte-Fac were wholly owned subsidiaries of JWP.

[1] Inte-Fac is currently a division of Penguin Maintenance, which is a subsidiary of EMCOR. Apparently before JWP changed its name to EMCOR, Penguin was a wholly owned subsidiary of JWP Maintenance & Service, Inc., itself a wholly owned subsidiary of JWP.

In 1992 and 1993, JWP was experiencing financial difficulties and on December 31, 1993, a petition for involuntary bankruptcy was filed against it. In early 1994, that petition was converted into a restructuring plan under Chapter 11 of the bankruptcy laws and JWP successfully emerged from that plan. On January 11, 1996, JWP changed its corporate name to EMCOR Group, Inc.

The facts in this case involve a garbage dump in Islip, Long Island. In this regard, it is possible to extract methane from the rotting garbage that underlies a landfill. That gas can be used to drive turbines which can generate electricity. With a law requiring utilities to buy such electricity (cogeneration) and with the assistance of a Federal tax credit, it is possible to convert trash to cash.

In 1987, the Islip Recovery Agency, which operated the landfill, entered into a contract with a company called Wheran Energy Corporation for the rights to the gas in the landfill. Wheran thereafter assigned the rights to National Energy Development which subsequently changed its name to GED

In 1989, and apparently for tax purposes, JWP's subsidiary, GED, along with another entity called AHI Islip, formed a third entity called Blydenburgh Associations, LP. AHI was a corporation formed by the investment banking firm of Allen and Company and Blydenburgh was a partnership consisting of GED (49 percent) and AHI (51 percent). As structured, it appears that in relation to the Islip landfill, Blydenburgh owned the physical means to extract the gas (wells and pipes) and GED owned the physical means to generate the electricity (engines and electric generators). As I understand the situation, because of the Federal tax credit, JWP, through GED would get an economic benefit from operating this cogeneration facility even if it ran on a break even basis or at a small loss. Similarly, Allen and Company, through AHI, would receive the same benefit. Obviously, those ultimate users of the tax credit could only derive a benefit if they themselves were profitable.

Interestingly, neither GED nor AHI nor Blydenburgh ever directly employed anyone to do any of the work at the Islip landfill. The direct supervision of the cogenerating facility was given over to a man named Bob Anderson who worked there pursuant to a contract that he had, under the name of CH4 Technologies, with GED. (CH4 apparently is a company owned by Anderson who is an expert in extracting gas from landfills.)

The actual manpower to operate the cogeneration facility was provided by Inte-Fac, which as noted above, is a wholly owned subsidiary of JWP and its successor, EMCOR. At the start of operations in May 1989, there were five such people, a number which was gradually reduced as time went on. All of the personnel involved in the actual operation of the facility were technically employed by Inte-Fac, but were supervised, on a day-to-day basis, by Bob Anderson.[2] The Inte-Fac payroll was done by a person named Diana Lakin, who was an employee of yet another subsidiary of JWP, namely Buton Contracting Services. From an accounting point of view, Inte-Fac billed GED for the cost of the manpower plus a 15-percent "profit." As these two Companies were owned by the same entity, the accounting entries hardly represent arm's-length dealing between two separate and independent entities.[3]

For some period of time, the Union has had successive separate contracts with Inte-Fac. These contracts covered separate bargaining units of employees who were assigned by Inte-Fac to work at various locations. The last collective-bargaining agreement covering employees at the Islip plant ran from November 3, 1990, to November 3, 1993.

As noted above, in 1992 and 1993, JWP encountered financial difficulties that eventually resulted in the bankruptcy proceedings that commenced in December 1993.

Douglas Gouchoe was hired by JWP in 1991 as director of strategic planning. In May 1993, when it was obvious that JWP was having financial problems, Gouchoe was assigned the job of selling off various of JWP's noncore subsidiary businesses. Among the companies that he was assigned to sell was GED. He was part of a team consisting of himself and Matz, which reported to Ed Kosnick of JWP. It seems to me that if JWP was not profitable at this time, then GED became an obvious asset to sell, as one of its principle benefits to JWP was the tax credit which could only be used if JWP was making enough money to make use of the credit. In any event, Gouchoe's job was to make GED as attractive as possible so that it could allure a buyer. According to Gouchoe, one of his intentions was to make the GED operation a "stand alone" operation which could be sold "as is." The General Counsel claims that this is simply a euphemism for standing alone, without a union.

After being made president of GED, Gouchoe in consultation with Anderson, decided to try to increase productivity at the generating facility by buying and installing a new piece of equipment called a "compressor after cooler." This, when installed, increased the plant's efficiency and allowed for the reduction in employee hours and labor costs. This piece of machinery was purchased in the name of CH4 Technologies, which GED reimbursed on a monthly basis. By some time in 1993, the work force to run this facility (excluding Anderson) was reduced to two employees.[4]

On September 1, 1993, Union Agent John Ahern sent a letter to John Lucchi, the president of Inte-Fac, requesting negotiations for a new contract.

Ahern sent another letter on January 11, 1994, requesting negotiations. According to Ahern, he was told by Lucchi (with whom he had negotiated with in the past), that the parent company, JWP, was undergoing some changes and that Gouchoe of GED would handle the negotiations. (Recall that at this time JWP was in bankruptcy proceedings.)

In January 1994, there was a fire at a Long Island Lighting substation which caused GED to shut down its operations for 17 days. When that problem was fixed, GED resumed operations but production did not come back to previous levels. It was later found, after a process of testing, that venting by the town of Islip caused a loss of gas flow from the wells which in turn reduced the amount of electricity generated.

[2] Inte-Fac also provides labor services to outside companies that are not connected to JWP. For example, it provides labor to Kings Plaza and the Roosevelt Island Tram.

[3] R. Kevin Matz was the president and treasurer of GED and also the sole director of Inte-Fac. Joseph W. Barnett was the secretary of GED and also the secretary/treasurer of Inte-Fac.

[4] As noted above, there were five employees plus Anderson when the plant started operations but this declined over time. Originally, there were three shifts, but sometime in early 1993, the third shift was eliminated.

On February 23, 1994, Ahern sent another letter to Lucchi stating in substance that he was unable to get in touch with Gouchoe and asking for Lucchi's assistance.

On March 22, 1994, Ahern met with Gouchoe who told him that JWP was looking to sell some of its companies, including the Islip plant. Gouchoe handed Ahern a press release regarding JWP's intention to shed some of its companies and an income statement which indicated that GED was losing money to which Ahern expressed some skepticism. According to Ahern's credited testimony, Gouchoe said,

> JWP was interested in selling the plant, and it was very, very difficult to sell a plant under union contract that had been losing money and he indicated to me that they didn't want to renew the contract, they just wanted to walk away, they wanted to have me walk away as the union representative . . . . There are only two men, there, why don't we just forget about this?

When Ahern refused to "walk away," Gouchoe said that he would get back to him within a week or two.

In relation to this meeting, Gouchoe confirms that he handed Ahern a press release and an income statement for GED. He testified that he told Ahern that JWP wanted to sell GED and that GED was losing money. According to Gouchoe, Ahern expressed doubt regarding the claim that GED was operating at a loss and pointed to the subcontracting entries on the income statement while asserting that some of the subcontracted work could be done by his members. (In fact, the work being subcontracted was not work that had previously been done by his union's members.) Gouchoe denied that he asked Ahern to "walk away" from representing the employees. He also testified that he told Ahern that the plant could be operated by one not two men and that Ahern responded that he needed two guys to make up a bargaining unit.

By letter dated March 30, 1994, Gouchoe wrote to Lucchi as follows:

> This letter is to inform you that . . . GED . . . no longer requires the services of Inte-Fac at GED's Hauppauge facility. Inte-Fac's role at GED has diminished over the past year and the Company has reached the point where it needs only one operator at the facility to work with GED's supervising engineer. Consequently, it will be more efficient for GED to hire that one individual directly.
>
> Effective at the end of the work day on April 1, 1994, Inte-Fac's subcontract relationship with GED is terminated. Please contact Diana Lakin to arrange payments of all outstanding invoices and amounts due to Inte-Fac.

On the same date, March 30, Lucchi, who testified that Gouchoe's letter to him was a complete surprise, sent a mailgram to Ahern stating that the two employees, Arthur DiNunzio and Vincent Muir, would be laid off on April 1, 1994. Simultaneously, Lucchi sent mailgrams to the two employees notifying them that due to the cancellation of the contract they would be laid off as of April 1, 1994.

As it turns out, GED then made an arrangement with Anderson so that CH4 engaged Muir to continue to work at the Islip plant as an "independent contractor." Muir worked for an unspecified period of time and then left.[5] Thus, for a period of about 5 months, there was Anderson and one other person doing the work at the Islip plant. Thereafter, in September 1994, as a result of the venting problem, Anderson hired two other people to perform vent test work. This work, which would otherwise have been done prior to March 30, 1994, by bargaining unit employees of Inte-Fac, lasted through December 1995. Neither DiNunzio nor Muir were offered employment in relation to the vent testing work that was undertaken.

The evidence shows that no one from GED, Inte-Fac or any other related company gave the Union any notice prior to the decision to make the layoffs. The assertion by Gouchoe that he told Ahern at the meeting of March 22 about the plant needing only one man, is not construed by me as constituting sufficient notice to the Union that he intended to terminate GED's contract with Inte-Fac and cause the work force to be reduced by half. There is therefore, no question but that the Union was not afforded an opportunity to bargain about the decision to engage in these layoffs or in the effects that these layoffs would have on the employees. It also is noted that although Muir continued to work at the facility, he was effectively transferred to a different employer and likely had his terms and conditions of employment changed.

Analysis

A. Single Employer

What's in a name? For reasons which I have no reason to believe are illegitimate, the parent company, JWP, has chosen to operate a business enterprise with a proliferating number of corporate names and entities. And although I doubt that this was the intent, the net result is to create confusion to someone like me who has to look at these corporate arrangements. I also suspect it must create a degree of confusion to the employees who worked at the Islip landfill electric generating facility. These people, who although ostensibly employees of Inte-Fac, worked exclusively for GED, while being paid on checks listing JWP Maintenance and Service which, in turn, were prepared by Diana Lakin, who herself is an employee of Buton Contracting Services which provides payroll services for Inte-Fac and GED. (All of these corporations being subsidiaries of JWP.) Moreover, insofar as the employees affected in this case, they not only worked exclusively for GED, but were hired, trained, and supervised by Bob Anderson who was in charge of the day-to-day running of the plant. And although Anderson worked ostensibly as an independent agent engaged by GED, (via CH4 Technologies), it is clear that he along with the employees in question, were the people who actually operated the facility.

The General Counsel alleges and the Respondents deny that Inte-Fac and GED constitute a single employer for purposes of the National Labor Relations Act.

The Supreme Court in *Radio & TV Broadcast Technicians Local Union v. Broadcast Service of Mobile,* 380 U.S. 255 (1965), enunciated the basic test for determining whether nominally separate business entities are in fact a single employer: The Court stated:

> In determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. . . . The controlling criteria, set out and elaborated in Board decisions, are integration of operations, common management, centralized control of labor relations, and common ownership.

[5] It is not clear when or why Muir left his apartment.

Subsequent Board cases have made it clear that single-employer status "depends on all the circumstances of the case, that not all of the 'controlling criteria' specified by the Supreme Court need be present." *Professional Eye Care,* 289 NLRB 738 (1988). *Blumfeld Theatres Circuit,* 240 NLRB 206 (1979). See also *Il Progresso Italo Americano Publishing Co., 2*99 NLRB 270 (1990); *Total Property Services,* 317 NLRB 975 (1995); *Precision Builders,* 296 NLRB 105, 109 (1989); and *Milford Services, Inc.* 294 NLRB 684 (1989).

In the present case, I am persuaded that Inte-Fac and GED should be found to be a single employer for the following reasons.

As these two corporations are each wholly owned subsidiaries of JWP, they have identical and not merely overlapping, common ownership. That is, there was no independent owners of Inte-Fac or GED who having their own separate ownership interest, might have exercised some, even if not decisive influence on the decision making process for each Company. Both were creatures of JWP which could and did decide their fates.

At the time of the alleged unfair labor practices there was some degree of common management between Inte-Fac and GED. Thus Kevin Matz, who was an officer and director of GED, was also a director of Inte-Fac. And Joseph Barnett was an officer of both corporations at the relevant times.

Although ostensibly the people who worked at GED's Islip plant were "employed" by Inte-Fac, they were assigned exclusively and permanently to the GED facility where they were supervised in their work by Bob Anderson. Anderson who, even though was engaged as an "independent contractor" by GED, was the sole person in charge of the actual operations of that plant. Thus, the daily supervision and control of the work force employed by Inte-Fac, was undertaken, in fact by GED. (As noted above, these employees were paid by checks listing JWP Maintenance and Service as the payor and the payroll was prepared by Diana Lakin, who was employed by another JWP subsidiary.)

The decision to reduce the work force at the Islip plant was made by Douglas Gouchoe, GED's president who, under instructions from Kevin Matz, was trying to sell that Company. At some point after the collective-bargaining agreement between the Union and Inte-Fac expired (covering the Islip employees) Gouchoe decided to meet with the Union in lieu of John A. Lucchi of Inte-Fac, who had negotiated the previous collective-bargaining agreement.[6] Moreover, as I credit Ahern's account of the meeting that was held on March 22, 1994, it seems that Gouchoe's purpose was to try to convince Ahern that GED was losing money and that as the plant only employed two men, the Union should walk away from the collective-bargaining relationship.

Thus, as of the time that the events in this case occurred, it seems to me that GED and Inte-Fac not only had identical ownership and some degree of common management, but also had common control of labor relations insofar as the Islip landfill employees were concerned. In view of the foregoing, I conclude that as to this particular set of employees, GED and Inte-Fac constituted a single employer.

[6] Gouchoe testified that in December 1993, Lucchi told him that the union contract was expiring and that the Union wanted to negotiate. Gouchoe states that he told Lucchi to see if we can't keep this status quo as we wanted to sell this thing and let a new buyer deal with it.

B. Unilateral Decision to Lay Off Employees

Gouchoe testified that he made the decision to terminate the contract between GED and Inte-Fac and to reduce the work force from two to one employee. He made this decision in the latter part of March and notified Luchhi of that decision on March 30, 1994. Lucchi, in turn, notified the Union and the employees, that due to Gouchoe's decision to terminate the contract between GED and Inte-Fac, the two employees working at that site would be laid off on April 1, 1994. It is clear to me that neither Gouchoe, nor Lucchi, nor anyone else associated with these Companies, gave prior notification to the Union of these decisions or gave it an opportunity to bargain about them. (The decision not only involved laying off one of the two employees, but also altered the employment status of the remaining employee, Muir.)

In the absence of a contractual provision whereby the Union clearly and unambiguously waived its right to bargain about layoffs (even when compelled by valid economic reasons), the decision to lay off employees affects their terms and conditions of employment and therefore constitutes a mandatory subject of bargaining. In the present case, the management-rights clause at article XXI does not constitute a waiver of the Union's right to bargain over economic layoffs. Accordingly, I conclude that the employer (Inte-Fac/GED) had an obligation to first notify and bargain with the Union prior to effectuating the decision to lay off employees. *Lapeer Foundry & Machine, Inc.,* 289 NLRB 952, 954 (1988); *Norco Products,* 288 NLRB 1416, 1421–1422 (1988); *Clements Wire & Mfg. Co.,* 257 NLRB 1058, 1059 (1981). As stated by the administrative law judge in *Norco Products,* supra,

> The law is well settled that an employer, whether unlawfully motivated, violates Section 8(a)(5) and (1) . . . when it institutes a material change in the terms and conditions of employment in an area that is a mandatory subject of collective bargaining without giving the bargaining agent both reasonable notice and an opportunity to negotiate about the change. . . . When an employer plans to lay off employees represented by a bargaining agent, it is the employer's "responsibility to notify the Union and to offer to bargain prior to implementing the layoff." Once the decision is made, "the employer must notify the Union and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected."
>
> Respondent argues that it gave the Union notice of the layoffs and that the Union did not attempt to bargain over that issue. I find no merit to that defense. McDonald did not notify the Union until the late afternoon of the very day the layoffs took place. There was no justification for such notice.
>
> There is no merit in Respondent's defense that the Union's inaction privileges Respondent's conduct or amounts to a waiver. First, as noted above, the Union was not given prior notice of the layoffs. Thus, McDonald's actions presented the Union with a fait accompli and precluded any meaningful bargaining. Second, Respondent's antiunion statements and discriminatory increase in the size of the layoff reveal an attempt to vitiate the role of the Union as bargaining agent. . . . Third, 3 days after the layoff, the Union claimed that the layoffs were discriminatory and demanded reinstatement for the employees, thereby indi-

> cating its desire to bargain over the layoff. Thereafter, the Union filed a timely unfair labor practice charge. [Citations omitted.]

Accordingly, based on the above, I conclude that the Respondents violated Section 8(a)(1) and (5) when they failed to notify the Union about the decision to lay off an employee and when they failed to afford the Union an opportunity to bargain about that decision.

C. The 8(a)(3) Allegation

The General Counsel also contends that the Respondents violated Section 8(a)(3) of the Act, arguing that the decision to lay off the employees in question was motivated by antiunion considerations. That is, the General Counsel contends that this decision was designed and motivated by an intention to rid the Respondents of any obligation to bargain with the Union by illegally creating a one-man unit.

As l have credited the testimony of Ahern regarding Gouchoe's request to walk away from representing the employees, this piece of evidence tends to support the General Counsel's 8(a)(3) allegation.

On the other hand, the evidence shows, and the General Counsel essentially concedes, that the decision to reduce the size of the work force was, at least in part, economically motivated. Indeed, the evidence does show that as of April 1, 1994, GED was not making a profit, that JWP was attempting to unload it, and that it could be operated with one, not two employees on a full-time, one-shift basis. Thus, under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondents might be able to argue that notwithstanding any illegal motivation, the reduction in force as of April 1, 1994, would nevertheless have occurred for valid economic reasons.

Having determined that the Respondents have violated Section 8(a)(5) with respect to their failure to bargain about the decision to lay off the employees and to shift employee Muir to another employing entity, and as the remedy for that violation would be substantially the same as one for an 8(a)(3) violation, it is not necessary for me to determine if the Employers violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to bargain with the Union with respect to their decision to lay off employees, the Respondents have violated Section 8(a)(1) and (5) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondents violated Section 8(a)(5) by failing to bargain about the decision to lay off employees I shall recommend, in accordance with *Lapeer Foundry & Machine, Inc.,* supra at 955, that they bargain with the Union concerning the layoff decision, as well as the effects of that decision, and to offer to reinstate both of the laid-off employees with backpay.

With respect to DiNunzio, the Employers' backpay liability shall run from the date of his layoff on April 1, 1994, until the date that he is offered reinstated to his same or substantial equivalent position or has secured equivalent employment elsewhere. Backpay for DiNunzio shall be based on the earnings and benefits that he normally would have received during the applicable period, under the terms of the expired contract, less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

In the case of Muir, who although laid off by Inte-Fac, continued to work for some time at the facility after April 1, 1994, his backpay shall run from April 1 until the time that he stopped working at the Islip facility. (There was no evidence that his leaving was discriminatorily motivated or that he was constructively discharged.) Muir's backpay shall consist of any difference in the wages and benefits that he received during the period after April 1, 1994, and what he would have earned under the expired contract between Inte-Fac and the Union. Interest shall be computed in the manner set forth above. As Muir's employment situation was significantly changed as of April 1, 1994, I shall recommend that he be offered reinstatement in order to restore the status quo ante between the Union and the Respondents as of March 31, 1994.

Having found that the Respondents failed to bargain over the April 1, 1994 layoffs, it is recommended that they bargain with the Union concerning the layoff decision and the effects of that decision. In this regard, the parties may bargain, inter alia, about the number of people needed to run the Islip facility, to what extent, if any, work can or should be shared by more than one person, and the consequences of GED's subsequent purchase by Douglas Gouchoe. These are some, but not all of the matters that may legitimately be discussed when negotiations resume.

On these findings of fact and conclusions of law and on the entire record, l issue the following recommended[7]

ORDER

The Respondents, GED and Inte-Fac, Islip, New York, and at their main offices, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees without providing the Union with notice and an opportunity to bargain about the decision and the effects of that decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive bargaining representative of the nonsupervisory employees employed at the Islip landfill and electrical generating facility, with respect to rates of pay, wages, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) On request, bargain with the Union concerning the decision to lay off employees April 1, 1994, and the effects of that decision.

(c) Within 14 days from the date of this Order, offer Arthur DiNunzio and Vincent Muir full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards; personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Islip, New York, and at their main offices, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 18, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."